

NO. \_\_\_\_\_

STATE OF TEXAS,	§	THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	
	§	TRAVIS COUNTY, TEXAS
TEXSAND SILICA MANAGE-	§	
MENT, INC. and TEXSAND	§	
SILICA, LTD.,	§	
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION,**  
**APPLICATIONS FOR TEMPORARY INJUNCTION AND PERMANENT**  
**INJUNCTION, AND REQUEST FOR DISCLOSURE**

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, by and through its Attorney General, Greg Abbott, on behalf of the people of Texas and the Texas Commission on Environmental Quality (TCEQ), files this Plaintiff’s Original Petition, Applications for Temporary Injunction and Permanent Injunction, and Request for Disclosure, and for cause of action would show the following:

**1. DISCOVERY CONTROL PLAN**

1.1 Pursuant to TEX. R. CIV. P. 190, Plaintiff intends that discovery in this case be conducted under Level 2.

**2. PARTIES AND SERVICE**

2.1 Plaintiff, State of Texas, is authorized to bring this suit through its Attorney General at the request of the TCEQ. TEX. WATER CODE § 7.105(a).

2.2 Defendant Texsand Silica Management, Inc. (“Management”) is a Texas domestic corporation and may be served with process by serving its registered Agent, Chris Thomas, 610 Fall Creek Hwy., Granbury, Tx 76049, or wherever he may be found.

2.3 Defendant Texsand Silica, Ltd. (“Silica”) is a Texas domestic limited partnership and may be served with process by serving its registered Agent, Chris Thomas, 610 Fall Creek Hwy., Granbury, Tx 76049, or wherever he may be found. Management is the General Partner of Silica.

### **3. JURISDICTION AND VENUE**

3.1 This Court has jurisdiction over this suit. TEX. WATER CODE §§ 7.002 & 7.105(a).

3.2 Venue is proper in Travis County. TEX. WATER CODE § 7.105(c).

### **4. AUTHORITY**

4.1 This suit seeks to enjoin certain unlawful acts of the Defendants and seeks the assessment of civil penalties, attorney’s fees, and court costs. TEX. WATER CODE §§ 7.032, 7.102, & 7.108.

4.2 When it appears that “a violation or threat of violation of a statute . . . has occurred or is about the occur” the State may bring suit in district court for “injunctive relief to restrain the violation or the threat of violation.” TEX. WATER CODE § 7.032.

4.3 No filing fee or other security for costs is required of the State. TEX. CIV. PRAC. & REM. CODE § 6.001.

4.4 “A person may not cause, suffer, allow, or permit a violation of a statute within the [TCEQ’s] jurisdiction or a rule adopted or an order or permit issued under such a statute.” TEX. WATER CODE § 7.101

4.5 The State is entitled to a civil penalty of not less than \$50 nor greater than \$25,000 for each day of each violation by any person who causes, suffers, or allows a violation of a statute, rule, order, or permit within the TCEQ’s jurisdiction. TEX. WATER CODE § 7.102.

4.6 TEX. WATER CODE § 26.121(a) contains the following prohibition:

Except as authorized by the [TCEQ], no person may:

- (1) discharge . . . industrial waste into or adjacent to any water in the state;
- (2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the discharge complies with a person's . . . water pollution and abatement plan approved by the [TCEQ]; or
- (3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state . . . .

4.7 Facilities with a Standard Industrial Classification (SIC) beginning with 10 through 14, must have a permit to discharge storm water to waters in the State. 30 TEX. ADMIN. CODE § 281.25(a)(4) (adopting by reference 40 C.F.R. § 122.26). In turn, 40 C.F.R. § 122.26(a)(1) requires a permit for a discharge of storm water associated with industrial activity.

4.8 Acceptance of a permit by the permittee “constitutes an acknowledgment and agreement that such person will comply with all terms and conditions embodied in the permit, and the rules and other orders of the [TCEQ].” 30 TEX. ADMIN. CODE § 305.124.

4.9 A permittee has the “duty to comply with all permit conditions. Failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action. . . .” 30 TEX. ADMIN. CODE § 305.125(1).

4.10 The TCEQ issued Texas Pollutant Discharge Elimination System (“TPDES”) General Permit No. TXR050000 on August 20, 2001 (“General Permit”). This permit sets forth detailed requirements, prohibitions, and conditions for the discharge of storm water associated with industrial activity. The General Permit authorizes discharges only according to notice

requirements, effluent limitations, monitoring requirements, and other conditions set forth in the permit. In pertinent part, the General Permit provides as follows:

4.10.1 “Storm water discharges associated with industrial activity that combine with sources of non-storm water are not eligible for coverage by this general permit, unless either the non-storm water source is described in Part II.A.5 of [the General Permit] or the non-storm water source is authorized under a separate TPDES permit.” General Permit II.B.5, p. 12.

4.10.2 The General Permit does not authorize the discharge of non-storm water unless the discharge is specifically described in the General Permit. General Permit II.A.5, pp. 9 - 10. The discharge of waters used in industrial processes is not covered by the storm water permit. *Id.*

4.10.3 “Discharges that would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses of receiving waters are not eligible for coverage under this general permit.” General Permit II.B.6, p. 12.

4.10.4 To obtain authorization to discharge under the General Permit, a facility must submit a completed Notice of Intent (“NOI”) to the TCEQ requesting coverage. General Permit II.C.2, p. 14. Before submitting a NOI, the facility must develop a Storm Water Pollution Prevention Plan (“SWPPP”). A SWPPP must contain the following minimum requirements:

A storm water pollution prevention plan (SWP3) must be developed and implemented before submitting [a Notice of Intent] for coverage under this general permit. The SWP3 must be maintained onsite or made readily available for review by authorized TCEQ personnel upon request. . . . The SWP3 shall be developed according to the requirements of this general permit to:

- (1) identify actual and potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges from the facility;
- (2) establish practices and any necessary controls that will prevent or effectively reduce pollution in storm water discharges from the facility and that ensure compliance with the terms and conditions of this general permit;
- (3) describe how the selected practices and controls are appropriate for the facility and how each will effectively prevent or lessen pollution;
- (4) discuss how controls and practices relate to each other such that together they comprise an integrated, facility-wide approach for pollution prevention in storm water discharges. The discussion may include references to literature or site-specific performance information on the selected controls and practices to demonstrate the appropriateness of each.

General Permit II.C.3, p. 15; III.A, p. 18.

4.10.5 The SWPPP must include a narrative description of all activities and potential sources of pollution that may reasonably be expected to add pollutants to storm water discharges. General Permit III.A.4.(b), pp. 20 - 21.

4.10.6 The SWPPP must include a section that address a maintenance program for storm water controls. The storm water controls must be inspected on a regular basis. Records must also be maintained to document the volume of sediment removed from catch basins, sediment ponds, or similar controls. General Permit III.A.5.(d), p. 24. Unless otherwise specified in the General Permit, the inspections must be conducted once each quarter and documented. General Permit III.A.5.(g), p. 26.

4.10.7 The General Permit incorporates the provisions of 30 TEX. ADMIN. CODE §§ 305.121 - .129. General Permit III. E, pp. 35 - 36. "Submission of an NOI for permit coverage is an acknowledgment that the applicant agrees to comply with the conditions of the general permit. Acceptance of authorization under the provisions of this general permit

constitutes acknowledgment and agreement that the permittee will comply with all terms and conditions embodied in the permit, and the rules and other orders of the [TCEQ].” General Permit III.E.1.(a).(1), p. 36. “The permittee has a duty to comply with all conditions of the permit. Failure to comply with any permit condition constitutes a violation of the permit and the Texas Water Code or the Texas Health and Safety Code, and is grounds for enforcement action . . . .” General Permit III.E.1.(a).(2), p. 36.

4.11 The Sector J of the General Permit governs storm water discharges for SIC codes beginning with the number 14.

4.12 A permittee has provisional authorization to discharge under the General Permit 48 hours after the post-mark date on its NOI submission to the TCEQ. General Permit II.C.2, p. 14.

## **5. BACKGROUND**

5.1 Defendant Silica owns a sand mine facility located at 3549 Monroe Hwy., Granbury, Texas 76049 (“Facility”). Management is Silica’s general partner and operates the Facility on behalf of Silica. Defendants excavate, wash, and screen industrial type sand at the Facility. Defendants’ operations at the Facility are classified under SIC code 1446. The Facility is near Rucker Creek which flows into the Brazos River, segment 1205.

5.2 On information and belief, Defendant submitted an NOI for TPDES General Permit No. TXR050000. By operation of law, Defendants are authorized to act under the General Permit for storm water discharges. Defendants do not have any permit for non-storm water discharges from the Facility.

5.3 TCEQ inspected the Facility on May 19, 2004. The inspector identified the following:

5.3.1 Defendants discharged process water (non storm water) to a series of sedimentation ponds then to pasture land. The water flowed across the pasture land to a pond. The pasture reflected siltation from the process water discharge. Water from the pond then appeared to flow into an unnamed tributary of Rucker Creek, then into Rucker Creek which terminates in the Brazos River.

5.3.2 Defendants did not include a narrative of all activities performed at the Facility in its SWPPP. Defendants later submitted the required information.

5.3.3 Defendants failed to conduct the required periodic and quarterly visual inspections, or failed to have documentation for the inspections, of the storm water management facilities as required by the General Permit. Defendants later submitted documentation of a recently completed inspection.

5.3.4 Defendants did not maintain records or an accounting of the estimated volumes of sediments removed from the Facility during maintenance events. Defendants later submitted a report on a maintenance episode occurring after the inspection that reflected the required information.

## **6. CLAIM 1: CIVIL PENALTIES FOR UNAUTHORIZED DISCHARGE OF PROCESS WASTE WATER**

6.1 In violation of TEX. WATER CODE §§ 7.101 & 26.121(a), Defendants discharged industrial wastes, process storm water, into or adjacent to the waters in the State without a permit or authorization to do so. Defendants' discharge of process waste water caused or will cause a condition of pollution to waters in the State. Each day on which Defendants have

discharged process waste waters from the Facility is a separate violation for which they are liable for civil penalties within the range permitted by law.

## **7. CLAIM 2: CIVIL PENALTIES FOR VIOLATION OF THE GENERAL PERMIT**

7.1 In violation of the TEX. WATER CODE § 7.101, 30 TEX. ADMIN. CODE §§ 281.25(a)(4) & 305.125(1), and the General Permit, Defendants failed to comply with the provisions of the General Permit. Defendants did not include all activities in which they are engaged at the Facility in the narrative in the SWPPP, did not conduct or document required periodic and quarterly inspections of the storm water management systems at the Facility, and did not determine the quality of sediment removed from the Facility during maintenance of storm water management facilities. Each failure is a separate violation that continues from day-to-day from the date of first violation until the violation is remedied. The date of first violation is on or about the date the General Permit became effective on a provisional basis for Defendants. Defendants are liable for civil penalties within the range permitted by law for each day of each continuing violation.

## **8. INJUNCTIVE RELIEF**

8.1 Defendants have caused the discharge of wastes and pollutants into the waters in the State without authorization from the TCEQ. Defendants continue to operate the Facility without a permit to discharge industrial or process waste waters to waters in the State.

8.2 Defendants threaten to continue to violate TEX. WATER CODE §§ 7.101 & 26.121 unless restrained by the Court.

8.3 Pursuant to TEX. WATER CODE § 7.032, the State requests that this Court issue a temporary injunction against Defendants Teksand Silica, Ltd. and Teksand Silica Management,



Inc., and their officers, agents, and employees, and those in actual concert or participation with them prohibiting the Defendants from discharging any industrial or process waste water from the Facility or in the waters in the State without a permit to do so.

8.4 The State requests that, after trial on the merits, the Court issue such permanent injunctive relief as is warranted by the facts of the case established at that time.

## **9. ATTORNEY'S FEES AND COSTS**

9.1 The State requests recovery of its attorney's fees and court costs expended in the prosecution of this case from Defendants. TEX. WATER CODE § 7.108 & TEX. GOVT. CODE § 402.006(c).

## **10. REQUEST FOR DISCLOSURE**

10.1 Pursuant to TEX. R. CIV. P. 194, Defendants are each requested to disclose to the Plaintiff, within 50 days of service of this request, the information or material described in Rule 194.2 (a), (b), (c), (e), (f), & (i).

## **PRAYER**

ACCORDINGLY, the State respectfully requests:

1. That Defendants be ordered to appear and answer herein;
2. That temporary and permanent injunctive relief be granted as requested in this petition;
3. That civil penalties be assessed as requested in this petition;
4. That the State recover its attorney's fees and court costs in this case; and
5. That the State be granted all other relief to which it is entitled.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney General

EDWARD D. BURBACH  
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ATTORNEYS FOR PLAINTIFF  
STATE OF TEXAS

**AFFIDAVIT**

**THE STATE OF TEXAS   §**  
**§**  
**§**  
**COUNTY OF TRAVIS    §**

Before me, the undersigned notary, on this day personally appeared Todd Jones, a person whose identity is known to me. After I administered an oath to him, upon oath he said:

My name is TODD JONES, I am over the age of twenty-one years and of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein:

I am employed by the Texas Commission on Environmental Quality as an Environmental Investigator in the Region 4 office of the Texas Commission on Environmental Quality.

I have read the foregoing Plaintiff's Original Petition, Applications for Temporary Injunction and Permanent Injunction, and Request for Disclosure and am familiar with the facts alleged. The facts alleged in paragraphs 5.1 through 5.3.4 of the Original Petition are within my personal knowledge and are true and correct.

\_\_\_\_\_  
TODD JONES

SUBSCRIBED AND SWORN TO BEFORE ME on \_\_\_\_\_, 2004,  
to certify which witness my hand and official seal.

Given under my hand and seal of office on \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS